No. 8115

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit 9

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

BRIEF OF APPELLEE

T. J. DAVIS,
H. L. MAURY,
A. G. SHONE,
Butte, Montana.

Filed.....1936.

....., Clerk.

McKEE PRINTING CO., BUTTE, MONT.

No. 8115

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

BRIEF OF APPELLEE

T. J. DAVIS,
H. L. MAURY,
A. G. SHONE,
Butte, Montana.

TOPICAL INDEX

TABLE OF CASES CITED

CODES AND TEXT-BOOKS CITED

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

BRIEF OF APPELLEE

It is not contended by the appellant that Clifford Gilbert intentionally placed his hand or any part of it through the openings in the side of the box or vane enclosing the rapidly revolving fan.

Of the third finger,

> "the bone was broken off and the finger was hanging by the cord; and the flesh on the little finger was torn away for approximately two-thirds of the length of the finger, or, I might say, scraped away from the bone."
> 119 R. 27 et seq.

The little finger, though without strength, remained attached for its full length.

> "the fan was revolving at medium speed." (119 R. 15.)

The fan, of course, was partially housed. If it is conceded, as it must be, that the plaintiff did not intend to stick his finger into the rapidly revolving fan, then the conception or hypothesis that such an injury was received by sticking his finger into the fan is not probable. It is scarcely believable. Were it affirmatively testified to, the Court would have to grant several new trials if a verdict and successive verdict involved such hypothesis. This proceeds from the common sense of all of us. It follows also from the testimony of George Shue, called by the railroad (a teacher of physics),

> "It would depend on what kind of an obstruction or stationary vane there was outside in order to state how far a man could stick in his finger with the fan revolving at six hundred revolutions a minute without the finger being cut off. In this particular fan he could probably put his finger straight in a matter of a fraction of an inch, because there is room to bend it down." (212 R. 5-12.)

Gilbert had on gloves. It was his right hand and had he, by clever adjustment of the finger, intentionally stuck his third finger into the revolving fan, the finger would not have been hanging by a cord at the end. It would have been cut in fragments, but no such carrying out of a well conceived plan of injuring his third finger and saving his second and index fingers,

would account for some injury to the little finger but no cutting of any part of it off by the fan. The clever hypothesis of counsel is based upon the coincidence that Gilbert happened to have on the finger that was cut, a cheap, metal ring of some kind. Truscott (134 R.) did not look down in the fan housing but coming from 100 feet away when the accident happened saw pieces of the fan out of the housing out in the splash pan.

The fine spun theory of the defense, built up and presented at the trial and cleverly presented by brief, arises from the coincidence of the metal ring on the finger that was badly injured. Rings are usually worn next to the hand. An expert for the defense is not so positive in his mind as counsel of the impossibility of the injury happening in the manner described by Gilbert. Quoting from a witness for the railroad:

> "If the fan flew apart, the pieces would have a tendency to go in the same plane or parallel plane of the revolution. One piece might hit another piece and drive it out of the housing or enclosing case. * * * I have known of other fans without the rim and with blades of mild steel that have crystallized to fly apart. You can tell by looking at steel when it is crystallized, but there is not a great deal of crystallization takes place in aluminum, although there is some."

Further, this witness being shown a piece of fan, said,

> "Down in the little cavity in that same piece that may be crystallization that is present and it may not. On this particular type of Mack truck the cooling system was never correct and that particular type of truck always heated. On this particular type of fan the placing of an outside rim on the vanes of the fan tends to strengthen the fan." (193 R. 8.)

The testimony of this witness on cross examination is instructive as to the speed of the perimeter of the fan being fifty-one or fifty-two miles an hour, probably, and that that would make a difference in his calculations and in his opinion as given on direct examination. This witness, however, on direct examination answered that it was not impossible but it does not seem likely that it could happen in the manner described by the plaintiff. (188 R. 18.)

The witness' testimony is also interesting as to the age of this particular truck and also as showing that the fan should have had a ring or band joining the tips of the outer ends of the vanes, such as was on a new type brought into exhibit by the defendant. (186 R. 20.)

The witness said that the truck was of an old model of which he had 350 under his charge at Coblenz, Germany, during the World War, but he did not know whether this was one of those particular trucks or not. (168 R. 15.)

This World War ended in November, 1918. The accident happened on October 30, 1933. The trial took place in 1935.

A witness brought the truck from Helena to Deer Lodge twelve years before the trial. (91 R. 8.)

It was used for three or four years after it came to Deer Lodge quite a bit, but after that not much. (91 R. 15.)

Of its idiosyncrasies prior to October, 1933, with reference to the fan belt, the shaft on which the fan revolved, and the fan itself, the testimony of a witness for the plaintiff is worthy of notice,

"Well, the fan belt was breaking quite often. The fan belt runs on a fly-wheel. The bearing in the fly-wheel was loose and it wobbled. It had a tendency to jump and break the belt. The belt set in a little groove, and the fan was a little loose, and if it would give a quarter of an inch it would bind that belt in that groove and break. I saw the belt break, I guess, ten or twelve times. It kept on breaking all the time, and we kept repairing it. I made a new one and that also broke. I do not know exactly the time at which this truck was delivered to the Milwaukee Railroad, but I know we towed it over there. We could not start it. The clutch was froze and we could not get the car in gear or out of gear, and we had to pull it over to the Milwaukee. I delivered the truck to the Milwaukee at the request of the Mayor of Deer Lodge. I cannot remember to whom I delivered the truck. I took it over to the Milwaukee and left it there. I believe Mr. Sears, the Master Mechanic, was there at the time. The body of this truck came from an old truck that was smashed by the Northern Pacific about fourteen years ago. At the time we took the truck to the Milwaukee it was impossible to start it without either towing it or allowing it to run down a hillside. I had seen people trying to start it previous to that, and we had tried for hours at a time to start. Practically every time we used it it was necessary to drag it through the streets of Deer Lodge in order to start it. Sometimes it would be necessary to drag it only a hundred feet, sometimes two blocks, and sometimes three or four. It had never been equipped with a self-starter. While it was supposed to be started by cranking, I do not believe it was possible to start it by cranking it unless it was awfully warm outside. Every time we took the truck out and ran it more than four or five blocks it boiled, and we would have to carry water with us. The day my son, the plaintiff, was injured, Mr. Sears came to the house and told me my son had been hurt. He said that while he had

> not been hurt bad he had had his hand cut. I went to the doctor's office, and there I saw that my son's third finger was hanging down and the little finger was all cut. The third finger was removed, and while he still has the little finger, it does not amount to much." (92 R. 20-94 R. 5.)

There was a knocking in the truck, a kind of a grind. If the fan belt was on, the noise was present, but if the belt was off the noise was absent. This noise could be heard by the driver or by anyone. (97 R. 25.)

The truck had not been repaired in any way from the above outlined condition by the Milwaukee, since it had been towed over for its use. (97 R. 18.)

A witness, William Arthur, for the plaintiff, describes the truck's condition as of 1932,

> "The Mack truck was an old dump truck. I operated the truck myself. At that time we had trouble starting it in the morning. It had no self-starter on it, and we would usually have to tow it a block before it would start. I do not know what year's model the truck was. The truck would heat when I drove it, and when I would drive it about eight or ten blocks I would have to put water in the radiator. With a load the truck would heat up in a distance of about three blocks. When the motor was cold the truck would jerk, but when the motor was warmed up it seemed to run fairly smooth. * * * I believe you could see a part of the fan from the driver's seat * * * four strips across the enclosure with space between the strips so that the fan was plainly visible * * * I think the fan belt broke twice while I was driving the truck." (98 R. 20-99 R. 17.)
>
> "We would leave the truck at night, and the following morning it was at times necessary to drag it in order to start it. I do not remember of ever

having had to tow it more than a block to get it started during the time I drove it. We never primed it during the time I drove it because the primers were plugged up with dirt." (100 R. 29-101 R. 5.)

"When I was operating this truck it was winter time, and in the cold weather it was necessary to tow the truck about a block to get it started. Clifford Gilbert was not with me during any of the winter of 1932 while I was driving this truck. The radiator did not leak much. * * * However, the engine heated. * * * Mr. Gilbert, the plaintiff, did not ride with me while I was driving the truck. At the present time I am employed as a switchman by the Milwaukee Railroad, the defendant in this case." (102 R. 15-103 R. 4.)

Another witness, Clark Cutler, noticed that in 1933,

"The water in the radiator would heat and boil over and that they would have an awful time starting it. It had to be towed sometimes three blocks and sometimes less to get it started. * * * It seemed to run pretty good when it got going. (103 R. 24.)

"The truck would heat up whether it was climbing a hill or being run on the level, and the radiator had to be filled with water pretty often. They had to carry water with them to fill it. I do not know just how far the truck would run between fillings, but probably four or five blocks sometimes." (104 R. 13.)

James O'Neill, a witness for the defendant, says:

"If the fan flew apart, the pieces would have a tendency to go in the same plane or parallel plane of the revolution. One piece might hit another piece and drive it out of the housing or enclosing case. * * * I have known of other fans without the rim and with blades of mild steel that have crystallized to fly apart. You can tell by looking at steel when it is crystallized, but there is not a great deal of

crystallization takes place in aluminum, although there is some. On this particular type of Mack truck the cooling system was never correct, and that particular type of truck always heated. On this particular type of fan the placing of an outside rim on the vane of the fan tends to strengthen the fan." (192 R. 9-193 R. 16.)

Dr. Shue, expert physicist, for the defendant says,

"I have heard of the old-fashioned grindstone flying apart, and this was probably due to centrifugal force. I believe, too, that circular steel saws have been known to fly apart, and the cause of that would, in my opinion, be centrifugal force. Circular saws are made of steel. Structural steel has a tensile strength of something like fifty or sixty thousand pounds to the square inch, or, in other words, it has five or six times the tensile strength of aluminum. Tool steel has probably from five to fifteen times the tensile strength of aluminum." (203 R. 15.)

"Excessive heat would weaken it, and vibrating and shaking would have its effect. If the fan were revolving at from six to eight hundred revolutions a minute and were running out of its periphery, there would be a small amount of vibration which might have a tendency to weaken the fan." (204 R. 19.

Dr. Shue agreed with the Encyclopaedia Brittanica that, "At high temperatures aluminum is very weak, whilst after being heated for a few hours at 350° C. work-hardness is permanently lost." He agreed, also, that,

"Mechanical working deforms and partly shatters the original crystals, but subsequent heating causes recrystallization. When the degree of deformation and temperature of heating are suitable, some crys-

> tal grains grow at the expense of others, and, under carefully selected conditions, one grain alone may grow and thus convert large pieces of metal into a single crystal. Exaggerated grain size such as this is avoided in practice, metal showing this phenomenon being defective in mechanical properties." (205 R. 4.)

Perhaps more convincing to the lay mind than all of the testimony of experts is the fact that the ring *which the learned counsel say broke the fan,* and the finger which was inside of the ring, did not travel in that unswerving, infallible, and invariable law of force, described by counsel in the brief, in a plane at right angles to the axis of revolution, but the ring was around the young man's finger and the finger was hanging to the hand after he admittedly received the injury. (127 R.)

Gilbert noticed, on the morning of the accident, that some of the cylinders, or at least one of them, were missing. (123 R.)

The motor was running above the idling speed. (124 R.)

In looking for the trouble,

> "On opening the hood I discovered that the number four pet-cock, which is the rear pet-cock or the one nearest the radiator, was in an open position. This would have a tendency to cut down the compression and would interfere with the proper operation of that cylinder, as whatever went into the cylinder in the form of gas could escape through that opening." (125 R. 29-126 R. 6.)
>
> "When I was preparing to close this pet-cock I was standing at the left-hand side of the motor looking toward the front of the truck." (126 R. 21.)

"There was no difficulty or strain in reaching over to manipulate that particular pet-cock, and standing on the ground one would be able to reach it without losing one's balance or anything of that kind." (126 R. 29-127 R. 3.)

"As to how the accident occurred, I reached for the pet-cock and I was turning it off when something hit my hand and injured it, but as to just what occurred I had not then and do not now have any definite knowledge." (129 R. 22.)

"I recall definitely that I did not put my hand into the fan." (150 R. 16.)

'The revolving fan was approximately two inches inside of those guards or coverings. The openings between those guards were eight or nine inches wide, I imagine. There is no possibility that I stuck my hand through those openings and into the fan; and there was nothing in there that I had any purpose in reaching for." (131 R. 5.)

The witness identified the piece of the fan that was in the Mack truck on the day that he was injured. (131 R.)

Mr. Murphy asked, "How do you know that? You found it thirty days later, did you not?"

The witness answered, "Yes."

The witness says further,

"When I was first hurt I knew that the fan had broken, but I did not know just what had happened to it, except that the pieces hit my finger. Nothing that I know of or can account for happened just before the fan broke." (132 R. 13.)

ARGUMENT

The case went to the jury on intra-state commerce employment. The counts on inter-state commerce were dismissed. The following statutes have been in force in Montana since 1911,

> "Every person or corporation operating a railroad in this state shall be liable in damages to any person suffering injury while he is employed by such person or corporation so operating any such railroad, or, in case of the death of such employee, instantaneously or otherwise, to his or her personal representative, for the benefit of the surviving widow or husband, and children of such employee, and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such person or corporation so operating such railroad, in or about the handling, movement, or operation of any train, engine, or car, on or over such railroad, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."
>
> 6605 R. C. M. 1935.

> "In all actions hereafter brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this act, the fact that the employee may have geen guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such person or corporation,

so operating such railroad of any statute enacted for the safety of employees contributed to the injury or death of such employee."

6606 R. C. M. 1935.

"An employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer."

6607 R. C. M. 1935.

Regardless of such statutes there was no assumption of risk in this case under the common law.

It is tiresome to multiply authority on when a particular state of facts does or does not demand that the court withdraw the case from a jury because of assumption of risk. The writer, having helped in the trial of both cases, believes that the facts for declaring the risk assumed as a matter of law were much more persuasive in a case of Williams v. Bunker Hill Co. (9th C. C. A.) 200 Fed. 211 than in the case at bar. The dialectics of appellant, too fine spun for juries or even judges to get much out of, are overruled in that case. Perhaps, it is as able and careful an analysis of this question as can be found anywhere.

There was no leaving the line of service for a youth hired to "drive" a truck when he lifted the hood to close a pet-cock through which "gas" (gasoline) was escaping. We suppose that if he had been carrying a spare tire and one running tire deflated on a trip that counsel would claim that he should not substitute the spare but

summon the master mechanic from the yard any distance away.

From the witness, Carl Zur Muehlen, for defendant, it is certain if the testimony is accurate, that the fan had a number of breaks in it. He found lines of cleavage that may have been made, he said, ten days or six months after the other breaks.

> "All I can say is that this break has been made since the other breaks occurred. This fresh break may have been made ten days or six months after the other breaks. I could not say how long after it was made." (168 R. 8.)

With our humble knowledge of physics, and looking at the lines of cleavage at various angles to a plane at right angles to the axis, we assert that a rapidly revolving fan, by means of these cleavages at various angles, could throw and would throw particles in any direction at right angles to the line of cleavage, or in a line which would be the result of the outward force made by the line of cleavage and the force asserted in the plane of revolution, but all such assertions are idle.

Truscott, one hundred feet away when the accident took place, went to the scene of the accident. He did not look down into the fan housing, but he saw parts of the fan outside of it in the splash-pan. The jury may well have believed that all of the pieces of the broken fan could have been produced if the defendant so desired.

Witness, Neumen, claim agent for the defendant, said that the parts that were broken from the fan were in a baggage-room in Butte. (217 R.) He says that,

"Mr. Sears did not hand those parts to me in Deer Lodge, nor did Mr. Jones or anyone else." (219 R. 18.)

Jones says that,

"Those pieces broken from Exhibit 3 were turned over to Mr. Neumen and kept by him some place. I do not know why they are not now in court." (162 R. 20.)

Sears says,

"Those pieces were gathered up and placed in a large envelope, which was kept in the office of the Company at Deer Lodge for probably sixty days or such a matter, and then the pieces were given to Mr. Neumen, the claim agent; and, so far as I know, Mr. Neumen took the pieces away with him." (145 R. 8.)

There was another circumstance not very savory to the jury. Dr. Unmack of Deer Lodge, the Company physician, was admitted by Mr. Murphy, for the railroad, to have been in Helena during some part of the trial but he was not called as a witness. (219 R.)

We hardly think, in view of the small size of the verdict, $3,500, that the assignment of errors concerning loss of earning capacity or on expectancy of life of the plaintiff, are worthy of answer on our part.

Instructions were perfectly correct, however, on these features. Instructions refused were properly refused. Specification 14 is as to the presumption of fitness, and that presumption has the force and effect of evidence. There is no room for presumption against evidence of unfitness as everwhelming as it was in this case from

the testimony of the witnesses both of plaintiff and defendant.

The offered instruction that the defendant should have known or reasonably expect that the fan would explode and cause injury to the driver of the truck does not state a correct principle of law at all. If the defendant had, on inspection, which was not made in this case, reasonable grounds to anticipate that the truck and fan and everything were so old and worn that it might break down and do some injury to somebody, not necessarily the driver of this particular truck, then the defendant had notice from which liability might arise. Where part of an instruction is erroneous, it is not incumbent upon the Federal Court to re-draft an instruction for counsel. The instructions as a whole, and they must be read together, were more than fair to the defendant. Few cases exemplify the rule better than this one that the presiding judge of the lower court is better able to judge of the effect of evidence than the appellate court. An interesting case on what the law in Montana is on the duty to furnish safe appliances, is Schroder v. Montana Iron Works, 38 Mont. 474, 100 Pac. 619. A chain, which a servant was using, broke and the servant was injured.

> "The master is not entitled to time to discover defects in things which are defective when put in use. He should examine them *before* putting them in use. He cannot evade his responsibility in these respects by simply giving general orders that servants shall examine for themselves, before using the place, materials, etc., furnished by him."
>
> Shearman & Redfield on Negligence, Vol. 1, Par. 192.

A master may be liable if it installs an old radiator and subjects it to heavy pressure without previous test. Monarch Tobacco Wks. v. Northern (Ky.), 124 S. W. 36.

> "If an old, used radiator was installed by appellant without testing, and in defiance of the laws of steam engineering, resulting in a bursting of the casting and injury of an employee placed to work about it, the owner will be held liable. The cause of the explosion is as certainly and satisfactorily proven as it is possible ever to connect such an effect with its cause. The evidence is circumstantial, aided by the opinions of expert machinists whose experience has taught them the applied laws of mechanics."
>
> Monarch Tobacco Wks. v. Northern (Ky.), 124 S. W. 36.

An interesting case showing the difference between the duties of the master and the servant as to latent risks is Cox v. American Chemical Company (R. I.), 53 Atl. 871, 60 L. R. A. 629, which held that liability might accrue from the presence of poisonous gases in a sewer which the servant was sent to clean out, and that the known presence of evil odors was not sufficient to hold him to have assumed the risk.

Notice to the master is frequently charged from previous unsatisfactory operation of the instrumentality causing the injury. Burnside v. Novelty Manufacturing Co. (Mich.), 79 N. W. 1108; 3 Labatt's Master & Servant, Par. 1037. Interesting note is found in Georgia Railway Co. v. Dooly, 12 L. R. A. 3427.

The fact that this truck was furnished by the city of Deer Lodge to the Railroad makes no difference. The

master is liable for a defective appliance furnished by an independent contractor. Winston v. Commercial Bldg. (Iowa), 124 N. W. 330.

In the instant case we have evidence that the fan wobbled, heated up, was of great age, and had seen long service, and this came from a witness for the defendant, James O'Neill. He also said that the construction of the fan was not the best or approved construction, and if there had been an outside rim on the vanes of the fan, it would have a tendency to strengthen the fan. (193 R.)

If the law were to be made over again the Court might be moved by counsel's argument that in a case such as this where the father of the plaintiff knew that the truck was generally in bad condition such fact would absolve the master. The defect was clearly latent but could have been discovered by inspection. The common sense of the thing seems to be that the railroad should never have taken the truck into its service at all.

Mr. Labatt says,

> "The fact that the instrumentality in question had or had not operated in a satisfactory manner prior to the time when it caused the injury in suit has been admitted as competent evidence to establish either that it was or was not a suitable one to be used as a part of the master's plant, or that the master was or was not excusably ignorant of its abnormally dangerous condition, as disclosed by the accident."
>
> 3 Labatt's Master & Servant, Par. 1035.

> "But it is recognized in a large number of cases that the fact of such an accident's having occurred

is itself competent evidence tending to show that the master should have been aware of the conditions to which it was due. A jury, therefore, is always warranted in inferring from evidence of the previous defective operation of an instrumentality that the master was negligent in not seeing that the instrumentality was properly constructed and adjusted, so as to be safe when it was originally put in use, or in not discovering its dangerous condition and making it safe before the accident."

3 Labatt's Master & Servant, Par. 1037.

We do not think it would aid the Court in further prolongation of this brief. The cases are so numerous that text-books are preferable.

We respectfully submit that the judgment should be affirmed.

T. J. DAVIS,
H. L. MAURY,
A. G. SHONE,
Attorneys for Appellee.